89-677

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

RICHARD ROE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

ROBERT P. WATKINS
Counsel of Record
JOHN D. CLINE
PAUL BUTLER
WILLIAMS & CONNOLLY
839 17th Street, N.W.
Washington, D.C. 20006
(202) 331-5000
Attorneys for Petitioner

October 26, 1989

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QUESTIONS PRESENTED

1. Does an appeal from a judgment of civil contempt for failure to comply with a grand jury subpoena become moot upon expiration of the grand jury's term?

2. Does the "capable of repetition, yet evading review" exception to the mootness doctrine apply to an appeal from a judgment of civil contempt where the witness and the government agree that the matter is moot and there is no record evidence that the witness will ever be subpoenaed again?

3. Does *United States* v. *Munsingwear, Inc.*, 340 U.S. 36 (1950), require that prior opinions in a moot case be vacated?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. ———

RICHARD ROE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit affirming in part the judgment of contempt entered by the United States District Court for the District of Columbia and holding that the case was not moot.

OPINIONS BELOW

The court of appeals' unreported opinion refusing to vacate its judgment as moot is reprinted *infra* at App. 1a-2a.[1] The earlier opinion of the court of appeals that

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[1] References herein to "App." are to the Appendix to this Petition. References to "C.A." are to the Appendix filed in the court of appeals.

was moot when rendered is reported at 877 F.2d 83 and is reprinted *infra* at App. 3a-18a. The district court's unreported orders—Apps. C, D, and E—were filed under seal by that court and have been lodged under seal with the Clerk of this Court.

JURISDICTION

The judgment of the court of appeals was entered on June 6, 1989. App. 22a. A timely petition for rehearing, with a suggestion for rehearing *en banc*, was denied on August 29, 1989. App. 23a, 24a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

Article III, § 2 of the United States Constitution provides in pertinent part: "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . . ."

STATUTES INVOLVED

Section 1657 of Title 28, United States Code, provides in pertinent part:

> (a) Notwithstanding any other provision of law, each court of the United States shall determine the order in which civil actions are heard and determined, except that the court shall expedite the consideration of any action brought under chapter 153 or section 1826 of this title . . . .

Section 1826 of Title 28, United States Code, provides in pertinent part:

> (a) Whenever a witness in any proceeding before or ancillary to any court or grand jury of the United

States refuses without just cause shown to comply with an order of the court to testify or provide other information, including any book, paper, document, record, recording or other material, the court, upon such refusal, or when such refusal is duly brought to its attention, may summarily order his confinement at a suitable place until such time as the witness is willing to give such testimony or provide such information. No period of such confinement shall exceed the life of—

(1) the court proceeding, or

(2) the term of the grand jury, including extensions,

before which such refusal to comply with the court order occurred, but in no event shall such confinement exceed eighteen months.

(b) No person confined pursuant to subsection (a) of this section shall be admitted to bail pending the determination of an appeal taken by him from the order for his confinement if it appears that the appeal is frivolous or taken for delay. Any appeal from an order of confinement under this section shall be disposed of as soon as practicable, but not later than thirty days from the filing of such appeal.

STATEMENT OF THE CASE

On October 6, 1988, a federal grand jury in the District of Columbia issued three subpoenas to Petitioner Roe as "Custodian of Record" for three entities. The subpoenas required Roe to produce certain documents to the grand jury. C.A. 1-4. The government had previously informed Roe that he was a target of the grand jury's investigation. Roe notified the government that he would assert his Fifth Amendment privilege against self-incrimination in response to two of the subpoenas. C.A. 5-11.

On February 10, 1989, the district court ordered Roe to comply with the two subpoenas. Apps. C, D. Roe de-

clined to do so on the basis of his Fifth Amendment act-of-production privilege.[2] On March 2, the district court held Roe in civil contempt and ordered him confined pursuant to 28 U.S.C. § 1826(a) for the life of the grand jury, unless and until he complied with the subpoenas. App. E.[3] The district court's judgment made clear that the grand jury would expire on June 2, 1989. *Id.*

On March 9, 1989, Roe appealed the judgment of contempt to the United States Court of Appeals for the District of Columbia Circuit. On June 2, the term of the grand jury expired and it was dissolved. On June 6, four days after the grand jury had ceased to exist, the court of appeals issued an opinion and entered a judgment reversing the contempt judgment regarding one subpoena, App. 13a-18a, but affirming the contempt judgment with respect to the other, App. 5a-13a.[4]

On June 8, 1989, two days after the court of appeals had rendered its opinion and six days after the term

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[2] The Fifth Amendment act-of-production privilege rests on this Court's decisions in *Fisher* v. *United States*, 425 U.S. 391 (1976), and *United States* v. *Doe*, 465 U.S. 605 (1984).

[3] Subject matter jurisdiction in the district court was founded on 28 U.S.C. § 1826(a). Roe was released on personal recognizance pending appeal.

[4] In affirming the judgment of contempt as to one subpoena, the court of appeals held that Roe could not invoke the Fifth Amendment act-of-production privilege in response to that subpoena because the government had established a "reasonable basis" to believe that Roe was a corporate custodian of records, and *Braswell* v. *United States*, 487 U.S. 99 (1988), precludes a corporate custodian from asserting the act-of-production privilege for corporate records. In applying the "reasonable basis" standard for determining custodianship, the court of appeals rejected the holding of another panel of the District of Columbia Circuit that the government must prove to a "foregone conclusion" that the witness is a corporate custodian to overcome the act-of-production privilege. *In re Sealed Case*, 832 F.2d 1268, 1280 (D.C. Cir. 1987).

of the grand jury had expired, Roe moved the court to vacate its opinion as moot. Roe contended that, after the expiration of the grand jury, there had no longer been a "case" or "controversy" that would permit federal jurisdiction under U.S. Const. art. III, § 2.

Roe's motion was not opposed by the United States. The government informed the court that it "agrees that the opinion of the Court must be vacated and this case remanded to the district court with directions to vacate the contempt citation." App. 25a.

Despite the agreement of the parties that the matter was moot and indeed had become moot four days before the court of appeals acted, and despite their agreement that the judgment of the court of appeals should be vacated, that court nevertheless refused to vacate its opinion, on the ground that "[t]he case falls within the 'capable of repetition but evading review' exception to the mootness doctrine." App. 1a.

REASONS FOR GRANTING THE WRIT

The error of the court of appeals is so fundamental that its judgment can be vacated without additional briefs or oral argument. That court rendered an advisory opinion on significant Fifth Amendment issues, despite the indisputable fact, acknowledged by both parties, that the case had become moot before the court of appeals acted. Moreover, the court's *sua sponte* invocation of the "capable of repetition, yet evading review" exception to the mootness doctrine directly conflicts with decisions from the Fifth, Eighth, and Ninth Circuits holding cases moot in these circumstances.

The court of appeals' decision also conflicts with *United States* v. *Munsingwear, Inc.*, 340 U.S. 36 (1950), in which this Court held that when a case becomes moot on appeal the court should vacate the lower court judgment and remand with directions to dismiss.

It is fundamental that Article III of the Constitution limits the power of the federal judiciary to live "cases" or "controversies." U.S. Const. art. III, § 2; *see Burke* v. *Barnes*, 479 U.S. 361, 363 (1987). This limitation confines Article III courts to deciding matters as to which there is a "presently existing dispute." *Id.* at 364. The courts of appeals, like other courts established under Article III, may not issue purely advisory opinions on legal isues, no matter how interesting or important they may believe those issues to be. *See, e.g., Correspondence of the Justices* (Aug. 8, 1793), *reprinted in* HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 66-67 (3d ed. 1988); *Hayburn's Case*, 2 U.S. (2 Dall.) 409, 410 n.(a) (1792). Cases that have over time lost their character as "present, live controvers[ies]" are moot and beyond the limited power that Article III confers upon the federal judiciary. *Hall* v. *Beals*, 396 U.S. 45, 48 (1969).

The narrow "capable of repetition, yet evading review" exception to the mootness doctrine applies only to the rare situation in which a case or controversy, although formally ended, remains alive in substance. The exception arises only when two conditions are met: "(1) the challenged action [is] in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party [will] be subjected to the same action again." *Weinstein* v. *Bradford*, 423 U.S. 147, 149 (1975) (per curiam); *see Murphy* v. *Hunt*, 455 U.S. 478, 482 (1982) (per curiam). Neither of those conditions exists here.

The court of appeals' application of the "capable of repetition" exception was incorrect as a matter of law and squarely in conflict with decisions of three other courts of appeals that have addressed the same situation. Moreover, the court's refusal to vacate its opinion and the judgment of the district court conflicts squarely with this Court's mandate in *Munsingwear*.

I. THE COURT OF APPEALS' HOLDING THAT A CONTEMPT JUDGMENT IS NOT MOOT AFTER EXPIRATION OF THE GRAND JURY CONFLICTS WITH DECISIONS IN THREE OTHER CIRCUITS.

A. The Court of Appeals' Decision Conflicts with the Ninth Circuit's Decision in *In re Grand Jury Proceedings*.

Under identical circumstances—an appeal by a grand jury witness held in contempt, ordered confined for the life of the grand jury, and released pending appeal—the Ninth Circuit concluded that the case was moot, holding that "the government cannot show that the limited duration of the contested action is likely to frustrate effective judicial review." *In re Grand Jury Proceedings*, 863 F.2d 667, 669 (9th Cir. 1988).

The court below purported to distinguish the Ninth Circuit decision as follows:

> The Ninth Circuit found that the capable of repetition exception did not apply to a contempt order covered by the "recalcitrant witness" statute, 28 U.S.C. § 1826(b) (1982). . . . This statute provides for an expedited appeal process, but only in cases where the appeal is from an order of *confinement*. As appellant was not confined pursuant to the order of contempt, his appeal was subject to the inevitable delays inherent in the typical appellate process.

App. 1a-2a (emphasis in original). But this purported distinction is simply incorrect. The witness in the Ninth Circuit case, contrary to what the court below supposed, had not been confined.[5] The Ninth Circuit did *not* hold

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[5] Although it is not apparent from the face of the Ninth Circuit's decision that the witness in that case was released, the record reveals that she was not confined pending appeal.

that the particular contempt order before it was covered by the expedited procedures prescribed by 28 U.S.C. § 1826(b), which mandates a 30-day time limit for an appeal from a contempt judgment only when the witness is confined.[6] The court instead observed that § 1826(b) provides a means of obtaining prompt review of contempt orders generally, so that "*if* [*the witness*] *is called to testify again*, her claims can be litigated in a timely fashion." 863 F.2d at 669 (emphasis added). The circumstances that led the Ninth Circuit to find the case moot in *In re Grand Jury Proceedings* were precisely those here; in both cases, the witnesses were held in contempt, ordered confined, and released pending appeal.

The court below was also mistaken in concluding, contrary to the Ninth Circuit, that appeals from grand jury contempt orders not involving confinement are "subject to the inevitable delays inherent in the typical appellate process." App. 2a. In fact, such orders by law are *not* subject to the "typical appellate process"; the courts of appeals are "obliged to 'expedite the consideration of *any* action brought under . . . section 1826,' " including those in which the recalcitrant witness is released pending appeal. *In re Sealed Case*, 829 F.2d 189, 190 (D.C. Cir. 1987) (per curiam) (emphasis added) (quoting 28 U.S.C. § 1657(a)); *see* 28 U.S.C. § 1657(a). This expedition ensures that grand jury contempt orders not involving confinement generally *can* be fully litigated during the life of the grand jury.[7]

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[6] Section 1826(b) provides that "[a]ny appeal *from an order of confinement* under this section shall be disposed of as soon as practicable, but not later than thirty days from the filing of such appeal." 28 U.S.C. § 1826(b) (emphasis added).

[7] An ordinary grand jury has a term of up to 18 months, and the district court can extend the term for up to an additional six months. Fed. R. Crim. P. 6(g). A special grand jury has a usual

B. The Court of Appeals' Decision Conflicts with the Eighth Circuit's Decision in *Larson*.

The opinion of the court below does not address the second prong of the "capable of repetition" doctrine at all. But to the extent that the court considered the issue and found that "there [is] a reasonable expectation that [Roe will] be subjected to the same action again," *Weinstein*, 423 U.S. at 149, its decision conflicts with the Eighth Circuit's in *In re Grand Jury Proceedings (Larson)*, 785 F.2d 629 (8th Cir. 1986). Under practically indistinguishable circumstances—an appeal by a grand jury witness as to whom there was no basis to believe that she would be subpoenaed before a new grand jury—the Eighth Circuit concluded that there was no reasonable expectation that the witness would be subjected to the same action again.[8] Accordingly, the court held that "the 'cap-

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term of 18 months, and with extensions may have a term of up to 36 months. 18 U.S.C. § 3331.

The grand jury in this case sat for a total of two years. It was due to expire in January 1989. It was extended six months to June 2, 1989, at which time its term was allowed to expire.

[8] In *In re Grand Jury Proceedings (Klayman)*, 760 F.2d 1490 (9th Cir. 1985), the government "stated unequivocally" that it would call the grand jury witness to testify at an upcoming trial. *Id.* at 1492. Accordingly, the court of appeals held that the second prong of the "capable of repetition" exception was satisfied, because "the underlying dispute is capable of repetition among these parties." *Id.* Even so, the court held that the exception was inapplicable and the case moot because the dispute was "not likely to escape review," in light of the opportunity the parties would have at trial to file motions in limine and to appeal from adverse determinations. *Id.*

Similarly, in *In re Grand Jury Proceedings*, 863 F.2d 667 (9th Cir. 1988), the second prong of the "capable of repetition" exception was held satisfied because the government informed the court "that there is a substantial likelihood that a new grand jury will soon investigate the same subject matter and will again attempt to

able of repetition, yet evading review' exception is not applicable and . . . the appeal has thus become moot." *Id.* at 631.[9]

The court of appeals' holding here not only conflicts with the Eighth Circuit's, but on the record is plainly baseless. Petitioner knows of no suggestion in the record that he will be subpoenaed by a new grand jury. The government's agreement that the case is moot strongly confirms that it has no intention of causing a new subpoena to issue. The court below simply had no basis for concluding (if it considered the question at all) that Roe would be "subjected to the same action again."

C. The Court of Appeals' Decision Conflicts with the Fifth Circuit's Decision in *Leppig*.

The court of appeals' decision also conflicts with the Fifth Circuit's decision in *Leppig* v. *Martin*, 386 F.2d 190 (5th Cir. 1967) (per curiam). A witness there was held in contempt for failure to answer questions before a Florida grand jury. He obtained a writ of *habeas corpus* from the federal district court. On appeal by the government, the term of the grand jury expired. The Fifth Circuit held that "the appeal has become moot and is dismissed." *Id.* There is no meaningful distinction between *Leppig* and this case.

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call [the witness] to the stand." *Id.* at 668; *see id.* at 669. Again, however, the court held the case moot because the government failed to show that "the limited duration of the contested action is likely to frustrate effective judicial review." *Id.*

[9] The court below cited *Larson* to support its conclusion that the *first* prong of the "capable of repetition" exception was satisfied in this case, but it ignored *Larson's* contrary holding on the *second* prong of the exception. App. 1a.

II. *MUNSINGWEAR* MANDATES THAT THE OPINIONS OF THE COURTS BELOW BE VACATED.

The court of appeals' refusal to vacate its own opinion as moot and to direct the district court to vacate the contempt judgment conflicts directly with this Court's direction in *Munsingwear*. That case declared that

> [t]he established practice of the Court in dealing with a civil case from a court in the federal system which has become moot while on its way here or pending our decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss.

Munsingwear, 340 U.S. at 39; *see Duke Power Co.* v. *Greenwood County*, 299 U.S. 259, 267 (1936). The Court explained that vacating the lower court opinions "eliminates a judgment, review of which was prevented through happenstance. When that procedure is followed, the rights of all parties are preserved; none is prejudiced by a decision which in the statutory scheme was only preliminary." 340 U.S. at 40. This Court has consistently followed the procedure that *Munsingwear* requires. *See, e.g.*, *Burke*, 479 U.S. at 365. When the courts of appeals have disregarded the prescribed procedure, this Court has not hesitated to grant certiorari and summarily vacate the judgments below. *See, e.g.*, *Alabama* v. *Davis*, 446 U.S. 903 (1980); *Great Western Sugar Co.* v. *Nelson*, 442 U.S. 92, 93-94 (1979).

The court of appeals ignored the *Munsingwear* rule in refusing to vacate its opinion. The court's disregard of *Munsingwear* is particularly remarkable because at the time it rendered its opinion, it was well aware from the district court's judgment, App. E, that the grand jury had expired four days earlier. Despite this knowledge, the court nevertheless issued an advisory opinion on issues that had clearly become moot.

CONCLUSION

For the foregoing reasons, Petitioner respectfully submits that the petition for writ of certiorari should be granted, the judgment of contempt summarily reversed, and the case remanded to the court of appeals with instructions to order all opinions and judgments in this matter vacated as moot.

Respectfully submitted,

ROBERT P. WATKINS
Counsel of Record
JOHN D. CLINE
PAUL BUTLER
WILLIAMS & CONNOLLY
839 17th Street, N.W.
Washington, D.C. 20006
(202) 331-5000
Attorneys for Petitioner

October 26, 1989

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1988

No. 89-5045

IN RE: SEALED CASE

[Filed June 27, 1989]

BEFORE: Mikva, Silberman and Williams, Circuit Judges

ORDER

Upon consideration of Appellant's Motion to Vacate the Opinion of the Court on the Grounds of Mootness, and the Memorandum of Points and Authorities submitted in support thereof, the Motion is hereby DENIED.

Although the term of the grand jury expired June 2, 1989, four days before the opinion was issued, we do not find the case to be moot. The case falls within the "capable of repetition but evading review" exception to the mootness doctrine. See *In re Sealed Case*, No. 89-5102, slip op. at 10 n.6 (D.C. Cir. June 27, 1989) (ruling on mootness in a case concerning other subpoenas issued by this grand jury); *In re Grand Jury Proceedings (Larson)*, 785 F.2d 629, 631 (8th Cir. 1986) (due to limited duration of grand jury's term, contempt issues, "in the absence of confinement or commitment," are capable of repetition yet evading review).

The Ninth Circuit found that the capable of repetition exception did not apply to a contempt order covered by the "recalcitrant witness" statute, 28 U.S.C. § 1826(b)

(1982). *In re Grand Jury Proceedings*, 868 F.2d 667, 669-70 (9th Cir. 1988). This statute provides for an expedited appeal process, but only in cases where the appeal is from an order of *confinement*. As appellant was not confined pursuant to the order of contempt, his appeal was subject to the inevitable delays inherent in the typical appellate process.

Accordingly, the Motion to Vacate on the Ground of Mootness is denied.

So ordered.

FOR THE COURT:

CONSTANCE L. DUPRE
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

No. 89-5045

IN RE SEALED CASE

Argued April 3, 1989

Decided June 6, 1989

Appeal from the United States District Court
for the District of Columbia
(Civil Action No. 88-00394)

Before MIKVA, SILBERMAN and WILLIAMS, Circuit Judges.

Opinion for the Court filed by Circuit Judge STEPHEN F. WILLIAMS.

Concurring opinion filed by Circuit Judge MIKVA.

STEPHEN F. WILLIAMS, Circuit Judge:

On October 6, 1988 the United States Attorney had appellant served with three grand jury subpoenas duces tecum, addressed to him as custodian of the corporate records of three different corporations. Appellant formally notified the U.S. Attorney that he would not comply with two of the subpoenas, asserting that producing those records would violate his Fifth Amendment privilege against self-incrimination. Upon application by the government, the district court ordered him to comply with the subpoenas and, when he refused, held him in contempt. *In re Two Grand Jury Subpoenas Duces Tecum Dated October 6, 1988*, Misc. No. 88-394 (D.D.C. Feb. 10, 1989) (compliance orders), (D.D.C. Mar. 2, 1989) (judgment and order of contempt).

Appellant recognizes that the Fifth Amendment privilege does not apply to records of a "collective entity." The exception started with the proposition that a corporation could not invoke the privilege to resist a demand for its records, *Hale v. Henkel*, 201 U.S. 43, 26 S.Ct. 370, 50 L.Ed. 652 (1906), but extends to an agent of a corporation, even where the content of corporate records sought might expose him to individual criminal liability, *Wilson v. United States*, 221 U.S. 361, 31 S.Ct. 538, 55 L.Ed. 771 (1911) (subpoena directed to corporation); *Dreier v. United States*, 221 U.S. 394, 31 S.Ct. 550, 55 L.Ed. 784 (1911) (subpoena directed to corporate custodian). The doctrine also applies to non-corporate collective entities, including even a small partnership, see *Bellis v. United States*, 417 U.S. 85, 94 S.Ct. 2179, 40 L.Ed.2d 678 (1974), and a labor union, see *United States v. White*, 322 U.S. 694, 64 S.Ct. 1248, 88 L.Ed. 1542 (1944).

Even for records of an individual, the privilege applies in only a limited fashion. It does not cover the *contents* of any voluntarily prepared records, including personal ones. *United States v. Doe*, 465 U.S. 605, 104 S.Ct. 1237, 79 L.Ed.2d 552 (1984). On the other hand, subject to the collective entity doctrine, the "act of production" of incriminating evidence may be protected by the Fifth Amendment where that act would have independent testimonial significance, as by manifesting the holder's acknowledgement of the existence of the documents or his custody or control over them, or his belief that they fit the description in the subpoena. *Fisher v. United States*, 425 U.S. 391, 410-11, 96 S.Ct. 1569, 1581, 48 L.Ed.2d 39 (1976); *Doe*, 465 U.S. at 614 n. 13, 104 S.Ct. at 1243 n. 13; see also *Braswell v. United States*, —— U.S. ——, 108 S.Ct. 2284, 101 L.Ed.2d 98 (1988) (finding act of production doctrine inapplicable to records of collective entity).

The first of the disputed subpoenas relates to records of an entity we will call Corporation A. As to it, appel-

lant's primary contention is that, although he is president, chief executive officer and majority shareholder of the corporation, its designation of another employee as its official custodian of records means that appellant cannot be considered a custodian. Further, he claims that the records are personal rather than corporate. We reject both claims and so far as Corporation A is concerned uphold the district court's order to compel production and its later contempt citation.

The second of the disputed subpoenas relates to what we will call Entity B. In fact it appears to be little more than a name, and we find insufficient evidence in the record that it is a corporation—or indeed any other kind of collective entity. Accordingly, we reverse the district court's order and contempt citation so far as these records are concerned.

The grand jury which issued the subpoenas is investigating allegations of income tax evasion and conspiracy to defraud the government of taxes. The U.S. Attorney has advised both appellant and Corporation A that they are targets of the grand jury's investigation. Further references to the facts are necessarily somewhat vague. To protect the secrecy of the grand jury investigation, we must refrain from mentioning the individual or the entities named in the subpoenas. As the government summarized its evidence in a statement filed *ex parte* and reviewed *in camera* by both the district court and this court, even the appellant is unaware of what facts the grand jury has uncovered. See *In re Sealed Case*, 832 F.2d 1268, 1281 (D.C.Cir.1987) (approving such submissions when necessary to protect grand jury secrecy).

I.

The first subpoena was directed to the appellant as "Custodian of Records" for Corporation A. It requested him to produce all bank records relating to a specified account in its name at a Maryland savings and loan asso-

ciation; in addition, he was ordered to testify before the grand jury, but only for the limited purpose of authentication.[1] The corporate employee who officially holds the position of custodian has testified that he was unable to find any evidence of the savings account. *Ex parte* Appendix of the United States ("*Ex Parte* App.") 27.

Appellant does not deny that Corporation A is a collective entity. He asserts only that he is not custodian of the records for purposes of the collective entity exception and that the particular records sought are personal rather than corporate.

Appellant Can Be Considered a Custodian of Any Records of Corporation A in His Possession or Control.

Appellant's claim that he is relieved of the burdens of the collective entity doctrine by the corporation's designation of another, and not himself, as custodian, finds no support in the doctrine's principle or the relevant cases. The doctrine rests on the combination of the entity's having no collective privilege and the custodian's having voluntarily assumed a duty to hold the records "in a representative capacity . . . on behalf of the group." *Bellis*, 417 U.S. at 89, 94 S.Ct. at 2183; see also *Wilson*, 221 U.S. at 380, 31 S.Ct. at 544 (custodian may have "voluntarily assumed a duty which overrides his claim of privilege"); *White*, 322 U.S. at 699, 64 S.Ct. at 1251 (official records and documents are held "in a representative rather than in a personal capacity"). Nothing in this

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[1] Neither of the subpoenas states that the testimony requested will be so limited, but the government concedes that appellant could refuse on Fifth Amendment grounds to testify further. See Brief for the United States 26-28; *Braswell*, 108 S.Ct. at 2293 (person producing documents before grand jury in capacity of corporate custodian may be required to identify and authenticate records in so far as this merely makes explicit what is implicit in the production itself); *Curcio v. United States*, 354 U.S. 118, 127 n. 6 & 128, 77 S.Ct. 1145, 1151 n. 6 & 1511-12, 1 L.Ed.2d 1225 (1957) (further testimony could violate Fifth Amendment).

theory suggests that the doctrine can apply only to one representative for a particular entity, or only to a representative officially designated as such by the entity.

Besides having no grounding in the doctrine's theory, any such formalistic requirement would undermine one of the policy values regularly invoked on its behalf—that of facilitating the enforcement of criminal laws against collective organizations and their employees. See, e.g., *Braswell*, 108 S.Ct. at 2294 & n.9. Under appellant's theory, if a corporate officer wished to circumvent the doctrine, he could simply designate as official custodian a person ignorant of the critical records' existence and location.

In fact, the *Braswell* Court expressly rejected a related argument. By way of mitigating the effect that his proposed reading of the act of production doctrine might have on law enforcement, Braswell suggested that if production of the documents would tend to incriminate the subpoenaed agent, the corporation could be allowed to appoint an alternative agent. Under the proposed expedient, the government could not require the original agent to aid in the search for the records, as statements to the surrogate would themselves tend to incriminate. The Court held that the proposal would unduly hinder access to the corporate documents:

> [W]here the [originally named] corporate custodian is likely the only person with knowledge about the demanded documents[,] the appointment of a surrogate will simply not ensure that the documents sought will ever reach the grand jury room; the appointed custodian will essentially be sent on an unguided search.

Braswell, 108 S.Ct. at 2294. Appellant's proposal here would equally circumvent the collective entity rule. Accordingly, we interpret "custodian" to encompass any agent of the corporation who under ordinary principles of corporate law has custody or control over corporate documents.

Second, appellant contends that the phrase "foregone conclusion" defines the standard by which the government must prove his custodianship. As support, he cites our pre-*Braswell* decision. *In re Sealed Case*, 832 F.2d 1268, 1280 (D.C.Cir. 1987). There, contrary to *Braswell*, we held that the act of production doctrine encompassed corporate agents. We went on to say that even if it did not, the "foregone conclusion" concept should govern resolution of factual disputes over custodianship.

The "foregone conclusion" language arose in *Fisher* and *Doe* as a component of the act of production doctrine. The Court said that where the existence and location of subpoenaed documents were a "foregone conclusion," it could compel production by the party controlling them, even though the party validly asserted a Fifth Amendment privilege. In such a case, the Court reasoned, the custodian's "communication" would add "little or nothing to the sum total of the Government's information." *Fisher*, 425 U.S. at 411, 96 S.Ct. at 1581; see also *Doe*, 465 U.S. at 614 n. 13, 104 S.Ct. at 1243 n. 13; Samuel A. Alito, Jr., *Documents and the Privilege Against Self-Incrimination*, U.Pitt.L.Rev. 27, 49-50 (1986) (reading "foregone conclusion" reference as relating to government's *independent* knowledge of records' existence and location); Comment, *The Rights of Criminal Defendants and the Subpoena Duces Tecum: The Aftermath of Fisher v. United States*, 95 Harv.L.Rev. 683, 686-87 (1982) (same). But once we disassociate the act of production doctrine from corporate records, as *Braswell* teaches,[2] it is not clear why any formula associated with that doctrine should bear upon or define the standard of proof on any relevant issue.

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[2] We note that *Braswell* left open whether the act of production doctrine might apply to corporate records held by a custodian who was also the sole employee and officer of the organization. 108 S.Ct. at 2295 n.11.

The government argues that one should resolve factual issues relating to custodianship in the same way that the Supreme Court has resolved the parallel issue of whether the subject of a subpoena has control over the records demanded. In *McPhaul v. United States*, 364 U.S. 372, 379, 81 S.Ct. 138, 142-43, 5 L.Ed.2d 136 (1960), the Court said that once the government had shown a "reasonable basis" for believing that the appellant had the ability to produce the records, the burden shifted to him to explain or justify his refusal. Similarly, in *United States v. Rylander*, 460 U.S. 752, 757, 103 S.Ct. 1548, 1552, 75 L.Ed.2d 521 (1983), the Court referred to *McPhaul* as placing on the subpoenaed party "the burden of production" for the defense that he lacks possession or control. See also *United States v. Lawn Builders of New England, Inc.*, 856 F.2d 388, 395 (1st Cir.1988). In view of appellant's undisputed role as president, chief executive officer and major shareholder of Corporation A, the government clearly has established a reasonable basis for believing him to have custody of corporate records; he has produced no evidence to the contrary, despite his opportunities to do so in the lower court. Although the appellant indicated in a responsive memorandum submitted to the district court that he could produce rebuttal evidence at an *ex parte* hearing, see Memorandum in Opposition to Government's Application for Orders Directing the Production of Documents Pursuant to Two Grand Jury Subpoenas Duces Tecum Dated October 6, 1988 1-2, 13, he never offered specific factual assertions, in affidavits or briefs, *ex parte* or public, that would tend to draw in question the normal inferences from his role in the corporation. Considering the record before us, we find appellant custodian of the records sought.

The Records Named in the Subpoena are Corporate Documents.

Appellant also denies that the Maryland savings account is corporate in nature or under Corporation A's control. He notes that the government itself asserts that

> funds which should have found their way into [Corporation A's] corporate bank accounts have been diverted into a bank account in [*Corporation A's*] *name but not within its control.* Rather, during the time relevant to this investigation that account at [the] [s]avings & [l]oan had been under the control of, and the funds within it *had been used exclusively by,* [appellant] for non-corporate matters.

Government's Application for Orders Directing the Production of Documents Pursuant to Two Grand Jury Subpoenas Duces Tecum Dated October 6, 1988, 4 (version served on appellant) (emphasis added).

The quoted passage may suggest a lack of relationship between the corporation and the savings account that is belied by other government assertions. The account was maintained in the corporate name, and the savings and loan was given a copy of Corporation A's articles of incorporation, as well as its correct corporate income tax identification number. According to the government's Statement of Evidence, the funds deposited in the account were legitimately earned by Corporation A and were corporate property—until they were allegedly misappropriated by appellant. *Ex Parte* App. 25. Appellant's powers as a corporate officer enabled him to determine which corporate funds should be funneled to the account.

In determining what records are corporate for purposes of the collective entity doctrine, we may start by noting some conceivable limits that have been rejected. Although the collective entity exception was based in part on the state's power to inspect corporate documents, *Bellis,* 417 U.S. at 89, 94 S.Ct. at 2183, it is clear that the records covered are not merely those that the corporation is required by law to keep.[3] In *Wilson,* for example, the

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[3] Maryland, the state with jurisdiction over Corporation A, provides that

> [e]ach corporation shall keep correct and complete (1) Books and records of its accounts and transactions; and (2) Minutes

Court held that the doctrine encompassed letters written by the corporation's president in the course of its transactions, just as much as it would corporate ledgers and minute books. 221 U.S. at 377, 31 S.Ct. at 543.

Wilson also states that records do not cease to be corporate merely because they show the corporation to be the victim of the custodian rather than itself the perpetrator of offenses. In considering private corporations, the Court said that it was no defense for the custodian to say that the corporation was not the subject of the investigation or charged with any crimes. *Id.* at 385, 31 S.Ct. at 546. Perhaps more directly on point for our purposes, it explained that a public official who "embezzled the public moneys and falsified the public accounts" could not on that basis "seal" the relevant documents from prosecuting authorities under the name of the privilege against self-incrimination. *Id.* at 380, 31 S.Ct. at 544. Thus we may confidently reject the suggestion that a corporate officer may escape the doctrine merely by showing that he used the records to cheat the corporation.

As the collective entity rests upon an "agency rationale," *see Braswell*, 108 S.Ct. at 2291, it is natural to look to agency law for analogies to determine whether documents are those of the collective entity. But the issues with which agency law typically wrestles—the liability of the agent to the principal, and of the principal to third parties for acts of the agent—do not present precise models for this question. It is one thing to know that an agent will be liable to the principal for profits realized on unauthorized transactions, see Harold Reuschlein & William Gregory, *Agency and Partnership* 128-29 (1979), and that a principal has some right to use force to recover chattels entrusted to an agent, *id.* at 127, but this

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of the proceedings of its stockholders and board of directors. . . .

Md. Corps. & Ass'ns Code Ann. § 2-111(a) (1985).

does not establish ipso facto that any document created by an agent for purposes of his defalcations is on that account the principal's document. Nor can the doctrines determining whether a principal is bound in transactions with third parties be adopted wholesale. For instance, assuming appellant misrepresented the character of the account to the savings and loan association (but not to the government), the misrepresentations might well bind the corporation in a dispute between it and the association on the theory of apparent authority; but the logic of such a finding would not self-evidently carry over to the government's benefit here. The concepts of implied or incidental authority seem more analogous. For example, even if appellant did not have explicit corporate authorization to open an account in Corporation A's name and deposit corporate funds in it, as president and chief operating officer he surely had incidental authority to do so. See Reuschlein & Gregory at 37 ("conferral of authority to . . . occupy a particular position must be taken as bestowing authority to do all the things normally incident to . . . the occupancy of the particular status").

The question we confront is slightly different. Instead of determining whether appellant was authorized by a corporate principal to act as he did, we must decide whether an agency relationship exists between appellant and Corporation A with respect to the Maryland savings account. Without trying to generate any definitive test, we conclude that here the records are corporate for purposes of applying the collective entity doctrine. Only one specific factor suggests the opposite—the assertion that they were used by appellant to steal from the corporation; *Wilson* makes clear that that is insufficient. The government's conclusory statements quoted above, at least as used by appellant, beg the question. For example, the contention that the account was not within the corporation's "control" appears inextricable from the ultimate one now before us. (In so far as the assertion merely

repeats the point of appellant's misuse, of course it adds nothing.)

Apart from appellant's alleged use of the account for larceny or for other illegal purposes, the records are corporate. The account is in the corporation's name, is run by the corporation's president and chief executive officer, and is funded with corporate property.[4] These facts afford a reasonable basis for concluding that any records relating to the savings account in appellant's custody are held on behalf of Corporation A; neither their contents nor their production by him is privileged.

II.

Appellant received a second subpoena duces tecum from the grand jury directed to him as "Custodian of Records" of Entity B. The subpoena was quite extensive, directing appellant to produce the following:

> 1. Articles of incorporation and minutes of corporate meetings. 2. Correspondence to and from [Entity B]. 3. Contracts to which [Entity B] is a party. 4. Bank records for all accounts, e.g. statements, canceled checks, duplicate deposit tickets, debit and credit memoranda, confirmations of wire transfer, signature cards and account agreements/contracts. 5. Accounting records, e.g., ledgers, journals, workpapers. 6. Leases, [Entity B's] personnel records, telephone bills and toll records. 7. Tax returns and financial statements.

Subpoena to Testify Before Grand Jury, Oct. 6, 1988, App. 4. Appellant declined to comply with the subpoena on the same Fifth Amendment grounds that he cited with respect to Corporation A's documents. See Letter from

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[4] *Cf. United States v. MacKey*, 647 F.2d 898 (9th Cir. 1981) (diary and calendar used by corporate executive to record meetings and transactions conducted as executive, as well as other events, held corporate for privilege purposes).

Appellant's Counsel, Nov. 2, 1988, App. 7-9. Again, the government responded that the collective entity doctrine controlled.

Unlike the case of Corporation A, this issue depends upon whether Entity B actually is a "collective entity." By its very terms, the threshold requirement for the application of the collective entity rule is that the appellant is acting as an agent of a *collective* organization that engages in "organized, institutional activity." *White*, 322 U.S. at 701, 64 S.Ct. at 1252. As we noted above, the entity need not be a corporation; such collectives as a partnership or labor union suffice.

For classifying a non-corporate entity, the Court in *Bellis* offered the following guidance:

> [The collective entity] analysis presupposes the existence of an organization which is recognized as an independent entity apart from its individual members. The group must be relatively well organized and structured, and not merely a loose, informal association of individuals. It must maintain a district set of organizational records, and recognize rights in its members of control and access to them. And the records subpoenaed must in fact be organizational records held in a representative capacity.

417 U.S. at 92-93, 94 S.Ct. at 285-86. At least outside the corporation, which is perhaps necessarily a collective entity, see *id.* at 100, 94 S.Ct. at 2189, the language seems to require more than one person to whom (or among whom) obligations may run.

The Court in *Bellis* used these general rules to find the three-person partnership before it to be a collective entity. It relied on a variety of facts, including the existence of a bank account in the partnership's name, stationery with the firm's letterhead, specific examples of partners holding the firm out to third parties as an independent institution, the number of employees other than partners

(six), the filing of separate partnership tax forms, and statutory provisions that treated a partnership as a distinct entity in other contexts. *Id.* at 96-97, 94 S.Ct. at 2187. Thus, the Court concluded that "the partnership here did have an established institutional identity independent of its individual partners." *Id.* at 95, 94 S.Ct. at 2187. It noted that the case required it to explore the "outer limits" of collective entity analysis. *Id.* at 94, 94 S.Ct. at 2186.

We can find in this record no reasonable basis for treating Entity B as a collective one. It appears to be nothing more than a name under which appellant shuffles funds. Although the bank account sought by the government was opened as a corporate account, with a designated president, vice-president and secretary, and with purported corporate bank resolutions filed, none of the persons named appears to have done more than lend an address or perform ministerial acts at appellant's direction. See Statement of Evidence, *Ex Parte* App. 4-10. There is no evidence that anyone executed articles of incorporation or other rudimentary constitutive documents, much less filed any such papers with any state. The word "Limited" appears at the end of Entity B's name, suggesting that it is a corporation, but nothing substantiates that except as the items mentioned above may do so. There seems to be no one within Entity B, other than appellant himself, to whom the sort of obligations contemplated by *Bellis* might run.

In view of the absence of any real collective entity, the government argues that Entity B should be treated as a collective organization because appellant has held it out as a corporation to third parties. The government does not claim the entity to be a *de facto* corporation—wisely, as the focus of that doctrine, in jurisdictions that apply it, is upon the existence of a good faith effort to incorporate. See 8 *Fletcher's Cyclopedia of the Law of Private Corporations* §§ 3777, 3796-3834 (1982). Rather, the

government cites the concept of corporation by estoppel—the doctrine that when an entity has been held out as a corporation to a third party, neither the entity nor the third party may deny the existence of the corporation in subsequent litigation. See *Cranson v. International Business Machines Corp.*, 234 Md. 477, 200 A.2d 33 (1964); *Fletcher's Cyclopedia* at § 3889.

We seriously doubt whether the doctrine of corporation by estoppel can ever establish a corporation for Fifth Amendment purposes. The estoppel depends on dealings between those holding the entity out as a corporation and the third parties to whom such representations are made. See *Fletcher's Cyclopedia* at § 3898 (the doctrine "cannot apply . . . to one who has not dealt with the association, or in any way recognized it as having a corporate existence, or in any way participated in holding it out as a corporation"). For example, creditors who have dealt with an entity as a corporation may be estopped to hold individuals personally liable for its debts. See, e.g., *Cranson v. International Business Machines Corp.*, 234 Md. 477, 200 A.2d 33 (1964). Thus it serves to protect reasonable expectations or reliance. *Cf. Fletcher's Cyclopedia* at § 3907 (noting general requirement of reliance by party asserting estoppel). But it seems improbable that the government as investigator will have engaged in dealings with the "entity" that give rise to the sort of expectations protected by the estoppel. More important, it is hard to see any principal link between the corporation by estoppel and the collective entity doctrine. The latter arises out of a person's having voluntarily assumed duties to act for an entity that does not enjoy the protection of the privilege against self-incrimination. Unless there actually are persons *within the entity* to whom the duties described by *Bellis* can run, it is hard to see why misrepresentations to outsiders can make the doctrine applicable. Here, in any event, there is no claim that appellant or Entity B implicitly or explicitly represented to

the government that it was a corporation, so the bare bones of the doctrine are not satisfied.

It is quite true that in *Bellis* the Court noted that the partnership had "in general, held itself out to third parties as an entity with an independent institutional identity." 417 U.S. at 97, 94 S.Ct. at 2187. But we do not read the reference as by any means adopting a doctrine of corporation (or "entity") by estoppel. The "holding out" was certainly an indicium that the persons involved acted as a collective entity, but that hardly indicates that *one* person's pretense of corporate status, in relations with a bank over one account, could turn that person and a few minions into a corporation or other collective entity.

The government cites a number of cases in support of its proposed use of estoppel, but we believe they establish a good deal less. *In re Two Grand Jury Subpoenae Duces Tecum Dated August 21, 1985*, 793 F.2d 69, 72 (2d Cir. 1986), is similar to *Bellis* in that the court mentions, among many other elements, that the entity it finds to be collective had held itself out as a multi-person law firm. Similarly, while the court in *United States v. Theodore*, 479 F.2d 749 (4th Cir.1973), said that a partnership was estopped to deny "the existence and viability of its corporate entity," *id.* at 753, this was simply a response to a claim that its failure to file articles of association prevented it from becoming a valid corporation. (The court assumed that a partnership did not constitute a collective entity.) The opinion does not reveal any other fact that might militate at all against a finding of collective entity. *In re Subpoena Duces Tecum to Gold Depository Unlimited of America*, 436 N.Y.S.2d 794, 106 Misc.2d 992 (N.Y.Sup.Ct.1980), which follows *Theodore* with virtually no discussion, does not indicate how the entity would measure up under the *Bellis* criteria.

Thus the record does not establish a reasonable basis for treating Entity B as a collective entity. In the ab-

sence of such a showing (or proof by the government that the possession, existence and authentication of the records is a "foregone conclusion," see *Doe*, 465 U.S. at 614 n. 13, 104 S.Ct. at 1243 n. 13), appellant may invoke his privilege against self-incrimination. We reverse the district court's order compelling appellant to comply with this subpoena and reverse the corresponding portion of its contempt order.

So ordered.

MIKVA, Circuit Judge, concurring:

I agree with the decision and thoughtful opinion of my colleagues. I write separately because I am troubled by the effort made by the government (and analyzed by the court) to apply an estoppel doctrine to the question of whether Entity B is a collective entity not entitled to claim the privilege against self-incrimination. My colleagues question "whether the doctrine of corporation by estoppel can ever establish a corporation for Fifth Amendment purposes." At 90. I think that the answer is appropriate, but that the question is not.

I find the government's argument more confusing than illuminating. It is clear that Entity B never held itself out to the government to be a corporation; if the only applicable doctrine is "estoppel" that indeed ends the inquiry. But the government is seeking to vindicate the public interest, rather than any victim of an estoppel. A more appropriate inquiry would be whether an entity taking the benefits of the corporate form expressly or impliedly "waives" the privilege of non-production of documents. Such a doctrine of waiver better fits the fact-situations that arise in this Fifth Amendment thicket. But since the government did not claim such a waiver here, and since the facts seem not to sustain such a holding, the result ordained by my colleagues would be the same.

APPENDIX C

Order, *In the Matter of Two Grand Jury Subpoenas Duces Tecum Dated October 6, 1988*, Misc. No. 88-0394 (D.D.C. Feb. 10, 1989) (Under Seal)

[Lodged Under Seal with Clerk, United States Supreme Court]

APPENDIX D

Order, *In the Matter of Two Grand Jury Subpoenas Duces Tecum Dated October 6, 1988*, Misc. No. 88-0394 (D.D.C. Feb. 10, 1989) (Under Seal)

[Lodged Under Seal with Clerk, United States Supreme Court]

APPENDIX E

Judgment and Order of Contempt, *In the Matter of Two Grand Jury Subpoenas Duces Tecum Dated October 6, 1988*, Misc. No. 88-0394 (Under Seal) (D.D.C. Mar. 2, 1989)

[Lodged Under Seal with Clerk, United States Supreme Court]

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1988
D.C. Misc. No. 88-0394

No. 89-5045

IN RE: SEALED CASE

[Filed Jun. 6, 1989]

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Before: MIKVA, SILBERMAN and WILLIAMS, Circuit Judges

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia and was argued by counsel. On consideration thereof, it is

ORDERED and ADJUDGED, by the Court, that the orders and judgment of the District Court appealed from in this cause are hereby affirmed in part and reversed in part, in accordance with the Opinion for the Court filed herein this date.

Per Curiam
FOR THE COURT:

/s/ Constance L. Dupre
CONSTANCE L. DUPRE
Clerk

Date: June 6, 1989

Opinion for the Court filed by Circuit Judge Williams. Concurring opinion filed by Circuit Judge Mikva.

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1988

Civil Action No. 88-00394

No. 89-5045

IN RE: SEALED CASE

[Filed August 29, 1989]

BEFORE: Mikva, Silberman and Williams, Circuit Judges

ORDER

Upon consideration of petitioner's petition for rehearing, filed July 21, 1989, it is

ORDERED, by the Court, that the petition is denied.

Per Curiam
FOR THE COURT:

CONSTANCE L. DUPRE
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

APPENDIX H

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1988

Civil Action No. 88-00394

No. 89-5045

IN RE: SEALED CASE

[Filed August 29, 1989]

BEFORE: Wald, Chief Judge; Robinson, Mikva, Edwards, Ruth B. Ginsburg, Silberman, Buckley, Williams, D. H. Ginsburg and Sentelle, Circuit Judges

ORDER

Petitioner's Suggestion For Rehearing *En Banc* has been circulated to the full Court. No member of the Court requested the taking of a vote thereon. Upon consideration of the foregoing it is

ORDERED, by the Court *en banc*, that the suggestion is denied.

Per Curiam
FOR THE COURT:

CONSTANCE L. DUPRE

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

APPENDIX I

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 89-5045
(C.A. No. 00394)

(UNDER SEAL)

IN RE SEALED CASE

RESPONSE TO MOTION TO VACATE
OPINION ON GROUNDS OF MOOTNESS

The United States of America, appellee, agrees that the opinion of the Court must be vacated and this case remanded to the district court with directions to vacate the contempt citation. *In re Grand Jury Proceedings*, 863 F.2d 667 (9th Cir. 1988); *United States* v. *Munsingwear*, 340 U.S. 36 (1950).

Respectfully submitted,

/s/ Jay B. Stephens
JAY B. STEPHENS
United States Attorney

/s/ Michael W. Farrell
MICHAEL W. FARRELL
Assistant United States Attorney

/s/ David Eisenberg
DAVID EISENBERG
Assistant United States Attorney